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No. 90-1613

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1990

LAKEVIEW DEVELOPMENT CORPORATION,
a California Corporation,

Petitioner,

v.

CITY OF SOUTH LAKE TAHOE,
a Municipal Corporation,
the TAHOE REGIONAL PLANNING AGENCY,
a separate legal entity created pursuant
to an interstate Compact between the States
of Nevada and California,

Respondents.

and

PEOPLE OF THE STATE OF CALIFORNIA
Ex Rel. John K. Van De Kamp,
Attorney General of the State of California,

Intervenor/Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Ninth Circuit and the District Court properly apply California law to reject a vested rights claim where the developer had taken no action on its original permit over a 12-year time span?

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For The Ninth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

Respondents Tahoe Regional Planning Agency and the People of the State of California respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 915 F.2d 1290 (1990).

2RESPONDENTS' STATEMENT OF LEGAL PROVISIONS INVOLVED

Lakeview contends this case has constitutional dimensions, and that the Fifth and Fourteenth Amendments to the United States Constitution are implicated by the Ninth Circuit's decision. No such concern is present. Neither are any regulations of the Tahoe Regional Planning Agency at issue, despite Lakeview's statement to the contrary. Petition at 2-3.

The case involves only the application of California's "vested rights" law to one particular project. In decisions compatible with the law of California, both the District Court and the Ninth Circuit have held that Lakeview possesses no such vested right. No issues justifying ~~this~~ Court's attention are presented. See Rule 17.1 of the Rules of the Supreme Court.

RESPONDENTS' STATEMENT OF FACTS

Lakeview's complaint, filed in 1985, sought to establish that it has a "vested right", i.e., a current right to build a 28-unit townhouse development, based on a permit granted in 1969, even though major changes in land use regulations applicable to the project had been enacted in the 16-year period involved.

Key among the land-use changes were rules and plans promulgated by the Tahoe Regional Planning Agency (TRPA), a bi-state agency created by the Tahoe Regional Planning Compact between California and Nevada, Public Law 91-148, 83 Stats. 360; Cal. Gov. Code,

§§ 66800 et seq.; Nev. Rev. Stats. 277.190 et seq. (December 18, 1969), as amended by Public Law 96-551, 94 Stats. 3233; Calif. Govt. Code §§ 66802 et seq.; Nev. Rev. Stats., §§ 277.190-277.220) (December 19, 1980) (hereinafter referred to as, "Compact").

Lakeview has never applied for *any* permit for this project from TRPA. It has chosen instead to try to obtain immunity from the application of any of TRPA's regulations based on a claim that Lakeview's ability to build the 24-unit townhouses was vested.

The concept of a "vested right" derives from notions of governmental estoppel. There is some point where a developer of property is entitled, via the vested rights doctrine, to protection from subsequent changes in the laws which applied to his or her project at the time of project approval. (See generally Williams *American Land Planning Law*, Sec. 111.01-111.03 (1986 Rev.Ed.).) Each state, by statute, case law, or a combination, defines that point for its jurisdiction.

Under California law, applicable to Lakeview's situation, the essential elements of a vested right include (1) material or substantial construction expense (2) incurred in reasonable, good faith reliance upon (3) the governmental issuance of an appropriate and valid permit for the project. (*See*, e.g., *Avco Community Developers, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785, 791-798, 132 Cal.Rptr., 386, 389-394, 553 P.2d 546, 550-554 (1976) (hereinafter cited as "Avco"); *Spindler Realty Corporation v. Monning*, 243 Cal.App.2d 255, 53 Cal.Rptr. 7 (1966),

certiorari denied, 385 U.S. 975 (1966); and *Anderson v. City Council*, 229 Cal.App.2d 79, 42 Cal.Rptr. 41 (1964).)[1]

According to Nat Sinclair, Lakeview's representative, Lakeview originally planned to build a townhouse and hotel development in three separate phases. First, Lakeview planned to develop 14 townhouse units (Unit 1) and sell them. Then it would build a second group of townhouses. (Unit 2 – the townhouses at issue), and presumably sell them. Finally, Lakeview planned to construct a 160-room hotel. (Deposition of Sinclair, (hereinafter referred to as, "Sinclair Depo."). (Clerk's Record, hereinafter cited as, "CR", 74, pp. 34-35, 68, 72, Sinclair Depo., CR 75, pp. 23-24.

Lakeview obtained a Special Use Permit (SUP) and permission to subdivide an undeveloped four-acre parcel from the City of South Lake Tahoe in 1969. (CR 67, Ex. D.)

The City's approval then went to the newly-created California Tahoe Regional Planning Agency (CTRPA) for the latter's review. CTRPA, as initially established, was not given any serious review responsibilities over commercial projects on the California side of the Lake Tahoe

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[1] In the District Court and in the Ninth Circuit, Lakeview attempted unsuccessfully to persuade the federal courts to ignore California's vested rights laws in favor of announcing a separate federal doctrine of vested rights. For reasons articulated by the Ninth Circuit, Petition Appendix at 8a-12a, Lakeview's quest was denied, and California law, as set forth in *Avco*, was deemed applicable to this case. Lakeview has not challenged that aspect of the Ninth Circuit's ruling in its Petition.

Basin. In such instances, CTRPA basically just mirrored the actions of local government.[2]

Consistent with its then-limited role, on June 18, 1969, CTRPA approved the Heavenly Valley Hotel and Townhouse SUP and subdivision map "subject to the conditions imposed by the City of South Lake Tahoe." (Lakeview's Excerpt of Record, at 100.)

Lakeview incorrectly asserts, "[T]here is little dispute that Lakeview . . . received all final, discretionary land use approvals necessary to undertake the project." (Petition at 9.) In fact, under the 1969 SUP and subdivision map approvals, which are all Lakeview ever essentially obtained, the City still required Lakeview to obtain building permits for each aspect of construction and also required that, "All buildings, tree removal and landscaping to be as approved by Architectural Review Committee of the Planning Commission, such approval to be obtained prior to issuance of any building permit for construction." (CR 67, Ex. F.)

After building the 14 townhouses in Unit 1, Lakeview, in 1974, obtained a foundation permit for six of the 24 townhouses at issue herein. That permit would only

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[2] (See Cal. Gov. Code, §§ 67000 et seq.) CTRPA was created by the California Legislature as a companion measure to its consent to the Tahoe Regional Planning Compact, which established TRPA. (See Cal. Gov. Code, §§ 66800 et seq.; Nev. Rev. Stats. §§ 277.190 et seq.; and P.L. 91-148, 83 Stat. 360 (Dec. 18, 1969).) Since the Compact did not authorize TRPA to review public works projects in the Tahoe Basin, California established CTRPA initially to provide that function at least on the California side of the Basin. (See generally *Raley v. California Tahoe Regional Planning Agency* 68 Cal.App.3d 965, 980-981, 137 Cal.Rptr. 699, 708-709 (1977).)

have allowed Lakeview to construct footings and a foundation for six of the units in Unit 2. (Lakeview's Excerpt, at 145-146). However, before it commenced any construction even pursuant to that limited permit, Lakeview decided not to proceed with the townhouses at that time. Lakeview abandoned the townhouse foundation permit in favor of beginning work on the hotel project. (Sinclair Depo., CR 74, pp. 91, 172; Sinclair Depo., CR 75, pp. 22-24; Finding of Fact No. 6, Petition Appendix at 34a-35a.)

To date, Lakeview has never expended any amount on actual construction of the townhouse project at issue. (See Finding of Fact No. 6, Petition Appendix at 34a-35a and No. 12, Petition Appendix at 36a; see also, e.g., Appellees' Supplemental Excerpt, which are photographs of the litigation property which accompanied TRPA's motion for summary judgment; the property, while rough-graded years ago, is wholly undeveloped.)

In July, 1985, Lakeview filed suit against TRPA in an effort to obtain a vested right against the application to its 28-unit townhouse project of that agency's regional plan, which carries out a bi-state and congressional mandate to protect Lake Tahoe's environment.

In the District Court, Lakeview claimed that its unconstructed, unapproved townhouse project was part of a unitary, mutually-dependent development. Because the Unit 1 townhouses and the 160-room hotel were completed in 1973 and 1984, respectively, Lakeview contended that the approvals obtained and the expenditures

made on these other parts were sufficient to vest Lakeview with the right to complete the 28-unit townhouse project.

The District Court concluded as a matter of law that the townhouse project was *not* dependent upon other elements (nor were the other elements dependent upon the 28-unit project).

Having determined that Lakeview's project stands alone, the District Court ruled that Lakeview could not rely on permits obtained or construction expenses incurred for other, separate projects in its vested rights claim for the 28-unit townhouse development.

The District Court held that Lakeview's project did not possess a vested right, and granted summary judgment to TRPA and to the People of the State of California.

On appeal, the Ninth Circuit affirmed, but on a different basis. It held that, even if Lakeview's project were deemed to have obtained "final discretionary approval" in 1969, Lakeview could not thereby assume that its approval would remain viable for more than 12 years, even though Lakeview had not yet commenced construction of its project.

REASONS WHY THE PETITION SHOULD BE DENIED

1. The Ninth Circuit's Decision Does Not Raise The Question Allegedly Presented In The Petition.

This case involves only the application of California's vested rights laws to an individual fact situation. It presents no federal questions, no opinion in conflict with

other Courts of Appeals decisions or the California courts, and no other appropriate basis for review pursuant to Rule 17.1 of the Rules of the Supreme Court.

Petitioner, by misapprehending the opinion of the Ninth Circuit, characterizes the result as depriving it of property rights in violation of constitutional principles. No such consequence exists.

Lakeview's complaint sought to establish a vested right to build a project, notwithstanding changes in the land use regulatory framework over time. It has been unsuccessful in that aim through two levels of judicial review. *Because Lakeview never has been found to possess the vested right it seeks, it hardly can complain that such a right has been improperly taken from it.*

As is discussed in more detail below, *any* of the paths chosen by either the Ninth Circuit or the District Court would be a valid basis for the denial of a vested right. All are based on undisputed facts, and all conclude that Lakeview has never attained the threshold elements necessary to possess a vested right. (See, e.g., *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957) ["A successful party in the District Court may sustain its judgment on any ground that finds support in the record."].) The decision below is demonstrably correct. It involves no issue requiring Supreme Court review.

The Ninth Circuit, addressing Lakeview's contentions, assumed that Lakeview, in 1969, had obtained all the necessary permits to build the Unit 2 townhouses. *But that is all the Ninth Circuit assumed:*

> "We assume, without deciding, that the California Supreme Court would recognize an exception to the rule in the case of sufficiently specific special use permits. We also assume, without deciding, that the special use permit that Lakeview received in 1969 was sufficiently specific to meet the requirements of the *Avco* decision. For even if we were to decide these issues in favor of Lakeview, its claim to a vested right would still fail, because it did not act expeditiously enough in proceeding with the development of the Unit Two townhouses." (Petition Appendix at 18a.)[3]

In its ruling, the Ninth Circuit hearkened to the earliest expositions of the vested rights doctrine in California, which declare that, " '[T]he vested rights theory is predicated upon estoppel of the governing body.' " (*Spindler Realty Corp. v. Monning, supra*, 243 Cal.App.2d, at 269, 53 Cal.Rptr., at 15, quoting from *Anderson v. City Council, supra*, 229 Cal.App.2d, at 89, 40 Cal.Rptr., at 47; see also *Avco, supra*, 17 Cal.3d, at 793, 132 Cal.Rptr, at 391, 553 P.2d, at 551.)

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[3] The Ninth Circuit offered no view on Lakeview's failure to expend any funds in actual construction of the townhouses, yet such expenditures are a necessary element of a vested right under California law. (*Avco, supra*, 17 Cal.3d, at 793, 132 Cal.Rptr., at 391, 553 P.2d, at 551.) Moreover, as the Ninth Circuit itself conceded, absent its assumption that Lakeview possessed the necessary permit for its project, the Court would have had to confront the issue of whether Lakeview *had* obtained the "final, discretionary approval" required. Petition Appendix at 18a, n. 11.

Thus, even if one were to reject the Ninth Circuit's analysis of the "reasonable reliance" issue, Lakeview's failures to meet the other elements of the vested rights test under *Avco* would still bar its vested rights pursuit.

The Ninth Circuit pointed out:

> "Lakeview has offered no evidence that any governmental agency placed obstacles in its way to developing its project expeditiously until 1981, when Lakeview first indicated it was ready to build the Unit Two townhouses. By that time twelve years had elapsed since the time Lakeview had received its special use permit. In 1969, it could not reasonably have been expected that the land on which Unit Two was to be built would still be undeveloped in 1981. . . . When, as in this case, the government does not interfere until well after the time the developer could have completed the entire project, the reason for recognizing a vested right evaporates." Petition Appendix at 19a-20a.

The point, which the Ninth Circuit makes clear, is that one cannot meet the "reasonable reliance" test of *Avco* in circumstances where 12 years elapse without construction between the granting of the original permit and the intervention of government:

> "[T]he developer should not be able to estop the government when the project temporally exceeds the scope of that approved. In other words, a government's commitment to a 'planned unit development' is necessarily conditioned on the developer's proceeding at a pace reasonably close to that contemplated at the time the project was approved. If the public is to be deprived of its power to control pollution and other problems caused by overdevelopment, it should be deprived only to the extent necessary to ensure private parties a reasonable degree of certainty about the legal status of their investments." (Petition Appendix at 21a.)

In this case, Lakeview received what the Ninth Circuit assumed, arguendo, was "final, discretionary

approval" for its Townhouse Unit 2 in 1969. From that point on until suit was filed, Lakeview ignored a series of critical events which obligated any reasonable person to investigate the consequences.

In 1969, Congress enacted the Tahoe Regional Planning Compact, establishing TRPA as a regional agency with a mandate to protect Lake Tahoe's threatened natural environment. TRPA shortly thereafter adopted a regional plan for the Lake Tahoe Basin, which plan encompassed numerous constraints on harmful development practices and projects.

In 1973, California enacted a law giving CTRPA expanded authority to protect that state's portion of Tahoe from environmental degradation. Lakeview not only knew of this development, but altered its own plans in an effort to beat CTRPA's timetable for enactment of more stringent land use controls.

In 1980, California and Nevada reached agreement on an amended bi-state compact, and Congress adopted those changes in an enactment which directed TRPA more strongly than ever to fulfill its mission of protecting Lake Tahoe. Key in those directions was a mandate to TRPA promptly to adopt a new regional plan which would attain specific environmental standards for the Basin. (See *People of the State of California v. Tahoe Regional Planning Agency* (9th Cir., 1985) 766 F.2d 1308.)

In 1981, the City of South Lake Tahoe investigated Lakeview's vested rights status and reported adversely to Lakeview's claim. (CR 67, Exh. D.) Lakeview consulted counsel regarding this report, and its representative was

advised that its counsel agreed that Lakeview possessed no vested right to develop the Unit 2 townhouses.

Later that year, TRPA wrote Lakeview's lawyers, asking them to apply to the agency for an administrative determination of its vested rights status concerning those townhouses. Lakeview did not follow up.

In 1983, CTRPA successfully sued the entity which had purchased the unfinished hotel site from Lakeview in 1979. In that suit, a court ordered construction halted because serious questions existed whether the hotel possessed a vested right vis-a-vis CTRPA. (That case was settled before final judicial resolution.) Sinclair, Lakeview's manager, submitted affidavits on behalf of the hotel owners in that litigation. Thus, Lakeview well knew of its consequences and potential import to its own situation.

Through all these significant developments, Lakeview declined to build its project and declined to inquire of any of the regional agencies as to the status of its 1969 permit from the City and the pre-1974 CTRPA. In oversimplistic obduracy, it maintained that, no matter what occurred, it was entitled to rely on that 1969 action indefinitely.

Such a stance, the Ninth Circuit declared, was not reasonable, given the passage of 12 years without action. That fact, under the circumstances of this case, the Court of Appeal found to be dispositive of Lakeview's vested rights claim.

The Ninth Circuit did *not* conclude that Lakeview ever possessed a vested right, contrary to Lakeview's

assertion in its petition. Petition at 7. Thus, there are no constitutional issues properly raised in this case.

2. Even If Lakeview Was Entitled To Indefinitely Delay Construction, It Still Possesses No Vested Right.

A lengthy delay without construction was not Lakeview's only failing in its vested rights pursuit. California law, it will be recalled, requires a proponent to incur substantial construction expense in reasonable reliance on a valid permit for its project. (*Avco, supra,* 17 Cal.3d, at 791-798, 132 Cal.Rptr., at 389-394, 553 P.2d, at 550-554.)

A. Lakeview Has Expended No Construction Funds On Its Townhouse Unit 2.

The parcel where Lakeview's Townhouse Unit 2 was proposed remains, today, 22 years after the SUP issued, a vacant lot. (See Appellees' Supplemental Excerpt.) In its petition, Lakeview claims to have "spent (or incurred debt) in excess of $13 million" in building "approximately 85%" of the project at issue. Petition at 3. To arrive at this figure, Lakeview cites monies spent or debt incurred on construction of *different* townhouse units and on a hotel, which was built by a separate entity. Lakeview includes acquisition, survey costs and other preconstruction expenses; lawyer fees incurred in this litigation; funds spent in response to abatement orders to end erosion and water quality degradation from the property site; and money spent *after* it became obvious that TRPA did not regard the townhouse project as having a vested right. None of the monies listed by Lakeview are recognized

under state law as contributing to Lakeview's vested rights claim. The California Supreme Court, in this context, has noted:

> " . . . [N]either the existence of particular zoning nor work undertaken pursuant to governmental approvals *preparatory to construction of buildings* can form the basis of a vested right to build a structure which does not comply with the law applicable at the time a building permit is issued." (*Avco, supra,* 17 Cal.3d at 792-793; 132 Cal.Rptr., at 391, 553 P.2d, at 551; emphasis added.)

If each dollar claimed by Lakeview is carefully examined, as was done in the District Court and in the Ninth Circuit, there can be no dispute that, as found by the District Court Judge, "Lakeview failed to construct improvements on the subject property or to incur substantial liabilities in respect to same." Petition Appendix at 38a.

B. Lakeview Neither Sought Nor Obtained Final Governmental Approval To Construct Townhouse Unit 2.

It has been a major argument of Lakeview throughout this case that its claim should not be denied based merely on its failure ever to have obtained building permits for Townhouse Unit 2.[5] Key to that argument is the notion, not adopted under well-established California state law, that as long as all final, discretionary land use approvals have been obtained, then the failure of a

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[5] We discount the foundation permits for six units which Lakeview briefly held and then abandoned in 1974.

proponent to secure a ministerial permit should not bar the finding of a vested right. (See, e.g., *Oceanic California, Inc. v. North Central Coast Regional Commission*, 63 Cal.App.3d 57, at 67, 133 Cal.Rptr. 664, at 670 (1976).) However, even if the foregoing general principle is accepted, as was assumed by the Ninth Circuit herein, Lakeview is not aided.

Lakeview, as noted, asserts that "there is little dispute" that it had "applied for and received all final, discretionary land use approvals necessary to undertake the project." Petition at 9. However, an examination of this contention reveals its falsity.

At all relevant times, Lakeview was obligated to obtain a waste discharge permit or waiver from the California Regional Water Quality Control Board, Lahontan Region, to construct the Unit 2 townhouses. (See Cal. Water Code, §§ 13264(a) and 13265.) In responding to California's Interrogatory No. 80 (CR 67, Ex. EE), Lakeview admitted it had never applied for such a permit. Lakeview's petition ignores this fatal obstacle to its claim.

In addition, on the face of the SUP granted for this project in 1969 by the City of South Lake Tahoe and by CTRPA, Lakeview was required to obtain not only a building permit for each building it proposed to construct, but to secure approval from the City's Architectural Review Committee of the Planning Commission for "[a]ll buildings, tree removal and landscaping. . . . " (CR 67, Ex. F.)

Moreover, the City Manager, by letter of August, 1970, pointed out the requirement for plan checks of

construction drawings prior to the issuance of building permits. (Lakeview's Excerpt at 118.)

Lakeview baldly contends that the completion of architectural review, plan checking and issuance of building permits were merely ministerial acts. (Petition at 15, n. 23.) But it supplied no evidence to dispute the plain language of the SUP and of the City Manager's cautionary letter.

Lakeview thus is in a situation like that of the developer in *Patterson v. Central Coast Regional Commission*, 58 Cal.App.3d 833, 844-845, 130 Cal.Rptr. 169, at 176 (1976), where a similar contention was addressed:

> "Although respondent so asserts . . . , the record contains no evidentiary support for his claim that he had in fact obtained all final discretionary approvals and acted in reliance thereon . . . , or that he had complied with all legal requirements for issuance of a building permit, making the issuance a ministerial act. [Citations.] Thus, the refinement of the vested rights principle noted above does not aid respondent, for the record does not allow either the trial court or this court to find that, in spite of the lack of a building permit, respondent had acquired a vested right to construct the houses. Mere approval of and expenditure on subdividing and grading activities, without more, create no additional vested rights beyond the scope of such limited approval [citations] and plans regarding future use do not extend the developer's protection. [Citation.]"

C. Lakeview's Townhouse Unit 2 Was Independent Of Other Elements Included In The 1969 Special Use Permit.

Lakeview presents its case to this Court on the erroneous and previously-rejected assumption that its Unit 2 townhouses were an integral and dependent part of another townhouse unit and a 160-room hotel. By such a maneuver, Lakeview spins a meritless argument that funds spent and construction which occurred on the other townhouses and on the hotel should count in the matrix of elements which are required for Lakeview to succeed in its vested rights quest for the Unit 2 townhouses.

However, Lakeview has been unsuccessful to date in persuading any court that the Unit 2 townhouses were, in reality, connected to other elements in the area. The District Court's decision is instructive:

> "As a matter of law the subject property is independent from and not connected with contiguous parts of the development. . . . Lakeview's approvals and construction of other portions of its development cannot, therefore, provide a basis for a vested right for the subject property." Petition Appendix at 38a.

Lakeview, as it did in the Ninth Circuit, castigates the District Court's decision as an improper determination of "significant disagreements as to material facts." (Petition at 15; and see n. 22.) What Lakeview ignores is that all the *facts* concerning the issue of the project's dependence or independence on other parts were undisputed; only the *conclusion* that one might draw from those facts was contested, and *that* conclusion was properly a legal one.

(*Compare Court House Plaza Co. v. City of Palo Alto*, 117 Cal.App.3d 871, 173 Cal.Rptr. 161 (1981)).

The correctness of the District Court's conclusion on this point is demonstrated by the following uncontested evidence:

a. Unit 2 is on a separate parcel or parcels from any other portion of the claimed "integral project". (CR 67, Exhs. J & K.)

b. Unit 2 is a separate subdivision from Unit 1. (*Idem.*)

c. Lots in Unit 1, with all its recreational amenities, were sold to the public as a complete development under California's Subdivided Lands Act, Cal. Bus. & Prof. Code § 11000 et seq. There were no guarantees made to any purchaser that Unit 2 would be constructed. All acquisitions by members of the public of townhouse ownership in Unit 1 have been made over 15 years in acknowledgement of this fact.[6]

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[6] The purpose of the Subdivided Lands Act is to prevent "fraud and sharp practices" by developers of subdivisions of projects with five or more units. (*In re Sidebotham* (1938) 12 Cal.2d 434, 436, 85 P.2d 453, 454; *Westbrook v. Summerfield, Roberts, etc., Inc.* (1957) 154 Cal.App.2d 761, 766, 316 P.2d 691, 694.)

Under the Act's provisions, which are designed to protect purchasers of newly-subdivided parcels of real property, the developer must advise the state's Department of Real Estate of, among other things, who will furnish community and recreational facilities to the subdivision. (Cal. Bus. & Prof. Code, § 11010(j).) The state then issues a public report, setting out

(Continued on following page)

d. Both the hotel and Unit 1 have operated entirely without the existence of Unit 2, which remains unconstructed to date.

e. Unit 1 and the hotel have been in separate ownership since 1979, with separate management and even litigation currently

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these facts (*id.*, § 11012; *Bodily v. Parkment Village Green Home Owners Assn., Inc.* (1980) 104 Cal.App.3d 348, 163 Cal.Rptr. 658.)

Significantly, the public report for the Unit 1 townhouses makes the recreational facilities a part of the Unit 1 project, and places the entire financial burden of maintenance of them on Unit 1. (Lakeview's Excerpt, at 115-117.) Lakeview has never sought modification of this public report to include any part of Unit 2 since the report issued in 1970.

It is also important to note that Lakeview obtained financing for Unit 1 *separate* from Unit 2. (CR 74 at 29-30.) Had that not been the case, sections 11013.1-11013.2 of the Cal. Bus. & Prof. Code would have severely limited Lakeview's ability to sell Unit 1 townhouses before the townhouses on Unit 2 were built. Pursuant to those statutes, had the projects been financed together as a single project, Lakeview either would have had to persuade a lender to release any lien on individual townhouse sales, which lien would have derived from the blanket encumbrance covering both Unit Nos. 1 and 2, or Lakeview would have had to put the townhouse sales proceeds in trust, post a bond, or put the title to the entire subdivision in trust until such a release from the blanket encumbrance was obtained.

Having derived significant advantage to itself by separating Unit 1 from Unit 2, as set forth above, Lakeview should be estopped to claim now – after the public report and after lot sales have taken place in reliance thereon – that the two projects really are just one.

on-going between the two ownership groups. (CR 74 at 142-143.)

f. The hotel has never shared with Unit 1 the right to use any of the recreational facilities built for Unit 1 and is not entitled to use them (CR 74 at 74.)

g. When the hotel owner was asked by the regional water quality control agency, in 1974, to do a waste discharge report for its development, the response was to describe the site as encompassing only the hotel parcel and to outline mitigation measures applicable only to the hotel project. No mention of either townhouse phase was included. (CR 67, Exhs. Y, Z & AA.)

h. Unit 1 was completely built out before any units in Unit 2 were ever constructed. (Lakeview's Excerpt at 59.) Between 1973-1974, when the Unit 1 townhouses were completed, and the filing of this suit in 1985, no substantial construction has taken place on Unit 2.

i. The hotel was built completely before any units in Unit 2 were ever constructed. (Lakeview's Excerpt at 73.) Between 1979, when Lakeview sold the hotel, which had then been only partially constructed, and the filing of this suit in 1985, no substantial construction has taken place on Unit 2.

j. The hotel parcel was owned and built by an entity separate from the entity which owned the townhouse property. (CR 74 at 58.)

k. The hotel was completed by owners different than Lakeview and to a different design than Lakeview had originally contemplated. (Lakeview's Excerpt at 68-69; CR 68 at 25 (Para. 44); CR 68, Ex. 43.)

In contrast to the foregoing, the only thing Lakeview can offer in support of its "unified" project is that in 1969, at the outset of Lakeview's development effort, it once *intended* that the three units – the hotel and the two townhouses – would operate together.

But, due to Lakeview's own decisions, and not due to any intervention by any government, Lakeview abandoned its original concept in 1973-1974, when it switched from its original plan to build the Unit 2 townhouses in favor of a hasty commencement of construction on the hotel. That decision ultimately led to Lakeview's sale of the hotel property in 1979 prior to its completion. If the project were one integral project, as Lakeview now contends, how could it remain so when the hotel was sold to strangers, when its management was turned over to others, when a lawsuit erupted between the hotel owners and Lakeview?

The applicable principles for determination of whether a project is unified or not for purposes of California's vested rights doctrine have been articulated in *Court House Plaza Co. v. City of Palo Alto, supra,* 117 Cal.App.3d 871, 162 Cal.Rptr. 161 (hereinafter referred to as, *"Court House Plaza"*). There, the developer received approval under a planned community zoning district to construct a single building in two phases. (*Court House Plaza,* 117 Cal.App.3d, at 878, 162 Cal.Rptr., at 162.)

In the first phase, the developer was to construct the first four stories of the structure on one parcel. In the second phase, six additional stories were planned. (*Idem.*)

The developer constructed the first four stories. Some years later, when the developer sought to build the rest of

the to-be 10-story building, the City declined to grant a permit, citing a new lower city height limit and other considerations.

The developer asserted it had expended "in excess of $450,000" to accommodate the upper floors when it built the first phase. The Court nevertheless denied that any vested right had thus been created to add six more stories to the existing building:

> "Once the appellant here had made substantial expenditures in reliance on the Phase 1 permits, it acquired a vested right to complete the four-story building . . . but no such right ripened as to Phase 2 for which no permits or other final approvals were obtained. Appellant essentially assumed the risk that the building might not be completed as planned since it was never exempted from the requirement of further permits and approvals before the six-story addition could be constructed, or from complying with all subsequently enacted codes." (*Court House Plaza*, at 117 Cal.App.3d, at 885, 162 Cal.Rptr., at 167.)

Lakeview's contentions do not demonstrate even as good a claim as was rejected in the *Court House Plaza* case. In *Court House Plaza*, the development was located on the same parcel; Lakeview chose to divide its parcel into separate parts for each unit. In *Court House Plaza*, the development was continuously owned by the same developer; here, Lakeview has never owned the hotel parcel at all, but even the ownership group which once owned it sold all its interest in it in 1979. (Lakeview's Excerpt at 68.) In *Court House Plaza*, the underlying structure was

voluntarily built oversize to accommodate six extra stories – a feature necessary *only* if the developer contemplated additional height on its building; Lakeview, which cites a recreation complex as inferring a unified project, Petition at 7, n. 13, was required to install that complex by its lender and by the California Department of Real Estate as a condition of being allowed to build and sell townhouses in *Unit 1*, whether or not Unit 2 ever was built. (Sinclair Depo., CR 74 at 28-29, 73-74.) Moreover, there is nothing in the hotel project which is dependent on the townhouses in Units 1 or 2 or vice versa. And, the hotel has never borne any share of the cost of building the common facilities for the Unit 1 townhouses, and is not entitled to use them.

There simply are no material indicia that all the townhouses *and* the hotel have been part of even a single *plan* since 1978-1979, even if mere planning without permits and without construction thereunder were enough to create vested rights in California.

3. Summary Judgment Was An Appropriate Procedural Vehicle By Which To Resolve Lakeview's Contentions

As it did before the Ninth Circuit, Lakeview asserts that *this Court* has "repeatedly held" that land use cases "are particularly unsuited for summary judgment."

Petition at 19. No authority is presented for this extraordinary claim, as none exists.[7]

Nothing in the Federal Rules of Civil Procedure, and nothing in this Court's – or any court's – pronouncements suggests any *per se* rule against the use of the summary judgment procedure in land use matters.

While courts are bound to exercise caution in complex litigation to ensure that no substantial issues of material fact obtain, the summary judgment procedure is generally available in all civil actions, without restriction. (See, e.g., *Daily Press, Inc. v. United Press International* (6 Cir., 1969) 412 F.2d 126, 128-129, certiorari denied, 396 U.S. 990. For a case where summary judgment was upheld in an inverse condemnation case, see *Ocean Acres Ltd. v. Dare County Board of Health* (4 Cir., 1983) 707 F.2d 103.)

It is certainly true that this Court has found it difficult to assert blanket rules for determining whether inverse condemnation has taken place. (See *Kaiser Aetna v. United States, supra,* 444 U.S., at 175.) However, the

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[7] Lakeview cites *Keystone Bituminous Coal Ass'n. v. DeBenedictis* 480 U.S. 470, 494-495 (1987) and *Kaiser Aetna v. United States* 444 U.S. 164, 175 (1979) in support of its claim that summary judgment is somehow inappropriate in land use cases. Petition at 19, n. 26. Neither of those cases discusses the propriety of summary judgment proceedings in this or any context.

Unhelpful, too, are the myriad cases cited in the Petition at 21, n. 29. Those are cases where, for whatever reasons, procedures other than summary judgment were used to reach a decision. Their existence does not logically support a conclusion that summary judgment is improper in *all* cases.

Court has never proclaimed any rule prohibiting the use of Rule 56 of the Federal Rules of Civil Procedure in such cases, much less a case involving only a vested rights claim as this one.

Lakeview confuses this Court's legitimate concern that all relevant facts be known to a court considering a "takings" case with its own belief that such a factual inquiry is impossible using the summary judgment procedure.

This case, however, presents a good demonstration of the merits of summary judgment as a means of resolving uncontested factual situations.

The record below consists essentially of items taken from the public record: applications, correspondence with various officials, court documents and materials from related litigation and the like. These materials were supplemented by excerpts from the deposition testimony of Nat Sinclair, Lakeview's longtime owner and manager. Issues of credibility simply were not relevant; no *material* fact was disputed; and the need for a trial to introduce the evidentiary materials would have been a waste of time and resources.[8]

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[8] Lakeview, Petition at 14, n. 21, infers impropriety by counsel for the State of California in the latter's submission of an affidavit and exhibits as part of the respondents' motion for summary judgment in the District Court. Counsel's affidavit explained the chronology of the construction of the hotel, based on documents and records produced via discovery in prior litigation between CTRPA and the owners of the hotel, successors to the Lakeview group. The exhibits consisted of

(Continued on following page)

Lakeview has made identical arguments regarding the summary judgment procedure to the District Court and to the Ninth Circuit without success. Its illogical and incorrect contention provides no basis for this Court's further involvement in this case.

CONCLUSION

For the reasons set forth, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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those documents and records. Lakeview objected to most of these materials, but the District Court overruled *all* of those objections; Lakeview did not appeal any of those rulings in the Ninth Circuit.

Significantly, Lakeview has not suggested that any of the material facts set forth in the affidavit or exhibits were inaccurate.